

May 8, 2012

California Law Revision Commission
Patricia Cowett, Commissioner
c/o UC Davis School of Law
400 MRak Hall Drive
Davis, CA 95616

Re: Your Request for Informal Assistance
Our File No. I-12-054

Dear Commissioner Cowett:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because you seek general guidance, we are providing informal assistance, rather than advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Also, please note, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Does the Act prohibit you, as a member of the California Law Revision Commission (the “Revision Commission”) from participating in decisions regarding (1) all common interest developments in the state, or (2) only small common interest developments in the state, if you own and rent a condominium that is part of a small common interest development?

CONCLUSION

Without facts identifying a specific governmental decision, we are unable to determine whether you have a disqualifying conflict of interest. Each decision must be analyzed to determine whether it will have a reasonably foreseeable material financial effect on any of your economic interests. You would have a conflict of interest participating in the governmental

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

decision only if there is a reasonably foreseeable material financial effect on one of your economic interest as discussed below.

FACTS

You are an appointed member of the Revision Commission and your position is designated in the Revision Commission's conflict-of-interest code. The Revision Commission's mission is to study problems in statutory law, as authorized by the Legislature, in order to recommend reforms. The Revision Commission does not have the power to enact legislation, rather, it makes recommendations to the Legislature and the Governor.

For several years, the Revision Commission has been studying and recommending reform of laws governing "common interest developments," a form of real property ownership that involves separate ownership of a specified unit, combined with a joint interest in "common area" property. An example is a condominium development. There are over 40,000 common interest developments in California, composed of more than 4,000,000 separately owned units. The Revision Commission's studies address imperfections in the general law governing common interest developments. The Legislature has already enacted several bills based on the Revision Commission's recommendations, and additional recommendations are now pending. In addition, the Revision Commission is considering other related issues. The Revision Commission does not make decisions affecting specific properties.

For the last eleven years, you have owned and resided in one unit in a four-unit condominium complex in San Diego that is entirely residential and zoned residential. This was your permanent residence until December 2011, at which time you moved and leased your unit to a tenant on a one-year lease. You are the secretary of the homeowners' association board, which has seven voting members.

You ask whether you may participate in decisions regarding (a) all common interest developments in the state and (b) only small common interest developments in the state.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental

decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Steps One and Two: Are you a public official making, participating in making, or influencing a governmental decision?

As a member of the Revision Commission, you are a “public official” within the meaning of the Act. (Section 82048(a).)

You have indicated that, as a member of the Revision Commission, you will be called upon to participate in decisions relating to the Revision Commission’s studies of common interest development law. However, you have not provided any information regarding a specific governmental decision. For example, matters the Revision Commission might consider could affect (1) all common interest developments in the state, (2) only small common interest developments, (3) units within all common interest developments, or, (4) only rental units within common interest developments. In order to determine whether a public official has a disqualifying conflict of interest in a particular governmental decision, the decision must be analyzed, applying the eight steps, to determine whether the decision will have a reasonably foreseeable material financial effect on any of his or her economic interests.

Accordingly, we are providing the following general information to assist you in making this determination whenever you are faced with a governmental decision. In addition, the FPPC publication entitled “Can I Vote? Conflicts of Interest Overview,” located at our website, www.fppc.ca.gov, should prove helpful.

Step Three: Identifying the public official’s economic interests

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(b).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

- An economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal expenses, income, assets, or liabilities, including those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Business Entity

The definition of a business entity includes any business operated for profit, regardless of whether it is organized as, for example, a corporation, partnership or sole proprietorship. (Section 82005.) If you have an investment of at least \$2,000 in your rental business entity, the business entity is an economic interest to you. (Section 871013(a); Regulation 18703.5.)

Real Property

If you have a \$2,000 or more interest in your condominium, you have an economic interest in real property.

Source of Income

If you receive annual income of at least \$500 from the rental of your condominium, your tenant is a source of income to you.

Personal Finances

A public official always has an economic interest in his or her personal finances.

Step Four: Directly or indirectly involved in the governmental decision

Different rules apply for determining whether an economic interest is directly or indirectly involved in a governmental decision depending on whether the economic interest is a business entity, source of income, real property or personal finances. (Regulations 18704 - 18704.5).

Step Five: Materiality standards

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision. (See Regulations 18705 – 18705.5.)

Step Six: Reasonably foreseeable

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) However, an effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Steps Seven and Eight: “Public Generally” and “Legally Required Participation” exceptions

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

